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IN THE
COURT OF APPEALS OF INDIANA

JUSTIN NICHOLAS SHINABARGER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 48A02-0608-CR-625
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MADISON CIRCUIT COURT
The Honorable Fredrick R. Spencer, Judge
Cause Nos. 48C01-0511-FB-427 and 48C01-0307-FB-216

April 24, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Justin Shinabarger[1] appeals from the trial court's order sentencing him to twenty-eight years on two convictions for Robbery, one as a Class B felony and one as a Class C felony. Shinabarger raises two issues on appeal:

1. Whether the trial court improperly considered an element of the crime of robbery as an aggravating factor and improperly weighed mitigators when determining Shinabarger's sentence.

2. Whether his sentence is inappropriate in light of the nature of the offense and his character.

We affirm.

FACTS AND PROCEDURAL HISTORY

On July 28, 2003, the State charged Shinabarger with Burglary, as a Class B felony, and Theft, as a Class D felony. Shinabarger requested bond, which the trial court granted. On October 25, 2005, while out on bond, Shinabarger committed robbery, as a Class B felony, and—later that same day and at another location—robbery, as a Class C felony. Each of those robberies involved a physical assault on a single victim. During his pre-trial incarceration for the robberies, Shinabarger escaped from jail and committed a carjacking, creating two more victims in the process.

On March 6, 2006, one day before trial was scheduled to begin, Shinabarger pleaded guilty to the burglary, theft, and robbery charges.[2] During Shinabarger's

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[1] In his brief, Appellant spells his name "Shinbarger." Appellant, however, signed his plea agreement "Shinabarger," which the State and trial court adopted.

[2] At the time, the charges for escape and carjacking were pending. Shinabarger has since been convicted of both of those crimes, which he appeals separately under cause number 48A05-0612-CR-700.

sentencing hearing, the trial court noted his guilty plea and willingness to pay restitution as mitigating circumstances. As aggravators, the court found that Shinabarger was out on bond at the time of the robberies, that there were multiple victims, and that, while incarcerated for the robberies, Shinabarger escaped and created still more victims. The court then ordered a total sentence of twenty-eight years on the two robbery convictions, with nine total years on the burglary and theft convictions to run concurrently. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Aggravators and Mitigators

Shinabarger first contends that the trial court improperly identified the aggravating and mitigating factors. The standard of review for a sentence imposed under the advisory statutory scheme,[3] when the trial court has identified aggravating and mitigating factors, is uncertain. As this court has noted:

> [The] after-effects [of Blakely v. Washington, 542 U.S. 296 (2004),] are still felt because the new [advisory sentencing] statutes raise a new set of questions as to the respective roles of trial and appellate courts in sentencing, the necessity of a trial court continuing to issue sentencing statements, and appellate review of a trial court's finding of aggravators and mitigators under a scheme where the trial court does not have to find aggravators or mitigators to impose any sentence within the statutory range for an offense, including the maximum sentence. The continued validity or relevance of well-established case law developed under the old "presumptive" sentencing scheme is unclear.

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[3] As the robberies each occurred after the effective date of the advisory sentencing statutes, those statutes apply to Shinabarger's sentencing. See Gibson v. State, 856 N.E.2d 142, 146 (Ind. Ct. App. 2006). The advisory sentence for a Class B felony is ten years, and the advisory sentence for a Class C felony is four years. See Ind. Code §§ 35-50-2-5, -6.

We attempted to address these questions in Anglemyer v. State, 845 N.E.2d 1087 (Ind. Ct. App. 2006), trans. granted. We observed that under the current version of Indiana Code Section 35-38-1-7(d), trial courts may impose any sentence that is statutorily and constitutionally permissible "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." [Anglemeyer, 845 N.E.2d] at 1090. We also noted, however, that Indiana Code Section 35-38-1-3(3) still requires "a statement of the court's reasons for selecting the sentence it imposes" if a trial court finds aggravating or mitigating circumstances. Id. In attempting to reconcile the language, we concluded that any possible error in a trial court's sentencing statement under the new "advisory" sentencing scheme necessarily would be harmless. Id. at 1091. Therefore, we declined to review Anglemeyer's challenges to the correctness of the trial court's sentencing statement. Id. Nevertheless, we stated, "oftentimes a detailed sentencing statement provides us with a great deal of insight regarding the nature of the offense and the character of the offender from the trial court judge who crafted a particular sentence" and encouraged trial courts to continue issuing detailed sentencing statements to aid in our review of sentences under Indiana Appellate Rule 7(B). Id.

Our attempt in Anglemeyer to analyze how appellate review of sentences imposed under the "advisory" scheme should proceed was met with a swift grant of transfer by our supreme court. Until that court issues an opinion in Anglemeyer, we will assume that it is necessary to assess the accuracy of a trial court's sentencing statement if, as here, the trial court issued one, according to the standards developed under the "presumptive" sentencing system, while keeping in mind that the trial court had "discretion" to impose any sentence within the statutory range for the [felony level of each conviction] "regardless of the presence or absence of aggravating circumstances or mitigating circumstances." See Ind. Code § 35-38-1-7.1(d); see also Fuller v. State, 852 N.E.2d 22, 26 (Ind. Ct. App. 2006) ("a sentencing court is under no obligation to find, consider, or weigh either aggravating or mitigating circumstances.") [,trans. denied]. We will assess the trial court's recognition or non-recognition of aggravators and mitigators as an initial guide to determining whether the sentence imposed here was inappropriate. In other words, even if it would not have been possible for the trial court to have abused its discretion in sentencing [a defendant] because of any purported error in the sentencing statement, it is clear we still may exercise our authority under Article 7, Section 6 of the Indiana Constitution and Indiana Appellate Rule 7(B) to revise a sentence we conclude is inappropriate in light of the nature of the offense and the character of the offender. See Childress v. State, 848 N.E.2d 1073, 1079-80 (Ind. 2006); see also Buchanan v. State, 767 N.E.2d 967, 972 (Ind. 2002)

> (holding that Indiana Constitution permits independent appellate review and revision of a sentence even if a trial court "acted within its lawful discretion in determining a sentence").
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> In reviewing a sentencing statement, "we are not limited to the written sentencing statement but may consider the trial court's comments in the transcript of the sentencing proceedings." Corbett v. State, 764 N.E.2d 622, 631 (Ind. 2002).

Gibson v. State, 856 N.E.2d 142, 146-47 (Ind. Ct. App. 2006) (emphasis added).

Without further guidance from our supreme court, we apply the abuse of discretion standard described in Gibson. An abuse of discretion occurs if the trial court's decision is clearly against the logic and effect of the facts and circumstances before it or if the trial court has misrepresented the law. Id. at 147. "Because reasonable minds may differ due to the subjectivity of the sentencing process, it is generally inappropriate for us to merely substitute our opinions for those of the trial judge." Corbett, 764 N.E.2d at 630 (citations omitted).

Shinabarger argues that the trial court incorrectly identified the existence of multiple victims as an aggravating factor, as "[a] fact which comprises a material element of a crime may not also constitute an aggravating circumstance to support an enhanced sentence." See Stewart v. State, 531 N.E.2d 1147, 1150 (Ind. 1988). But "[i]t is a well established principle that the fact of multiple crimes or victims constitutes a valid aggravating circumstance that a trial court may consider in imposing consecutive or enhanced sentences." O'Connell v. State, 742 N.E.2d 943, 952 (Ind. 2001). That principal is especially true where a trial court considers the fact that the defendant committed separate crimes against separate victims. See id. (discussing Little v. State,

475 N.E.2d 677, 686 (Ind. 1985)). Here, the "multiple victims" referred to by the trial court were the separate victims of separate crimes. Thus, the trial court did not abuse its discretion when it identified those multiple victims in imposing enhanced and consecutive sentences.

Nonetheless, even if we ignored the multiple victims aggravator, we cannot say that the trial court abused its discretion in enhancing Shinabarger's sentence. A single aggravating circumstance may be sufficient to enhance a sentence. Kien v. State, 782 N.E.2d 398, 411 (Ind. Ct. App. 2003), trans. denied. Here, the trial court recognized two aggravating circumstances aside from the fact of multiple victims.[4] Specifically, the court identified Shinabarger's commission of crimes while out on bond and Shinabarger's escape and carjacking. This court has previously held that the commission of additional crimes while out on bond is a valid aggravating circumstance. See Field v. State, 843 N.E.2d 1008, 1011 (Ind. Ct. App. 2006). And we have held that attempted escape is a valid aggravator. See Lyons v. State, 475 N.E.2d 719, 722 (Ind. Ct. App. 1985), trans. denied. It follows that an actual escape, then, also must be a valid aggravator.

Shinabarger also asserts that his mitigating circumstances were entitled to more weight than that assigned to them by the trial court. But the court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998). Indeed "the 'proper' weight to be afforded by the trial

[4] On appeal, Shinabarger does not challenge the legitimacy of the two additional aggravators. Rather, Shinabarger only challenges the use of multiple victims aggravator.

court to the mitigating factors may be to give them no weight at all." Crain v. State, 736 N.E.2d 1223, 1242 (Ind. 2000). Regarding Shinabarger's guilty plea specifically, Shinabarger pleaded guilty the day before trial was to begin, indicating that his plea "was more likely the result of pragmatism than acceptance of responsibility and remorse." Davies v. State, 758 N.E.2d 981, 987 (Ind. Ct. App. 2001) (quotations omitted), trans. denied. And regarding Shinabarger's willingness to pay restitution, Shinabarger presents no cogent reasoning as to how the trial court erred in considering that mitigator. Thus, that issue is waived. See Ind. Appellate Rule 46(A)(8)(a). We cannot say that the trial court abused its discretion in considering the aggravators and mitigators and enhancing Shinabarger's sentence.

Issue Two: Inappropriate Sentence

Shinabarger also contends that his sentence is inappropriate in light of the nature of the offense and the character of the offender. We exercise with great restraint our responsibility to review and revise sentences, recognizing the special expertise of the trial bench in making sentencing decisions. Bennett v. State, 787 N.E.2d 938, 949 (Ind. Ct. App. 2003), trans. denied. This court will only "revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." App. R. 7(B).

Here, the sentence imposed by the trial court is not inappropriate in light of the nature of the offenses. Shinabarger committed the robberies while out on bond for the charges of burglary and theft. Also, Shinabarger used a weapon in one of the robberies,

causing injury, and physically attacked the victim in the other robbery. Hence, the offenses were violent in nature.

The sentence is also not inappropriate in light of the character of the offender. Again, Shinabarger committed the two robberies while out on bond for the previous theft and burglary charges. Moreover, Shinabarger escaped and created two additional victims in a carjacking. Shinabarger's active avoidance of the penal system and criminal disregard for others reflects poorly on his character. Nor are we persuaded that the identified mitigators reflect positively on Shinabarger's character, as discussed above. Thus, the sentence imposed by the trial court is not inappropriate in light of the nature of the offenses and the character of the offender.

Affirmed.

MAY, J., and MATHIAS, J., concur.